No. 84-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,
Appellants,

v.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

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REPLY BRIEF

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1. *The Facts.*

In their Motion to Affirm, Appellees (hereinafter "Playtime") have adopted and compounded the error of the Ninth Circuit by relying upon maps and testimony which were submitted at an early TRO hearing and which, as pointed out in our Jurisdictional Statement (p. 17), were in error because of the necessity for preparing them so quickly. At no time, for example, have the race track or sewage treatment plant been located within the area where adult theatres can locate (the "set-aside zone").[1] At no time has the set-aside zone been "less

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[1] Playtime states (p. 2 n. 5) that in Renton's objections to the Magistrate's report and recommendation, the City extolled the fact that its set-aside zone included Longacres Racetrack. This is simply not true. What Renton's counsel stated was that "The area

than 200 acres".[2] At no time has most of the set-aside zone been unavailable for commercial development.[3]

The important points which Playtime attempts to obscure are that (1) Renton's set-aside zone for the location of adult theatres is presently made up of 520 acres (a fact that Playtime does not dispute); (2) witnesses for *both* parties acknowledged that many commercial

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available for an adult theater *or its environs* already includes Longacres Race Track, which is one of the major adult entertainment areas in the State of Washington. * * * This location is primarily *served by the same roadways and is located in the same area* as the Magistrate has termed inaccessible, unattractive and inconvenient." CR 143 at 16 (emphasis added). The point counsel was making was that the set-aside zone bordered the racetrack and was served by the same roadways.

[2] Playtime states (pp. 1-2) that as a practical matter, the land actually "available" was less than 200 acres. The testimony cited by Playtime (p. 2 n. 5) shows that "availability" was being used by the witness in one of two ways: to determine whether a particular piece of property was *outside* the set-aside zone, or to determine that a specific land area *inside* the set-aside zone was presently being used for other purposes. The first inquiry is irrelevant, so long as the remaining area is large enough to give free expression to adult theatres' rights, and the second poses one of the very issues in the case—must premises be presently "on the market" in a kind of turnkey operation in order to meet the constitutional requirement of availability?

[3] Playtime alleges (p. 2) that most of the available land within the original 400 acres was "within a flood plain". A flood plain, however, is not an uninhabitable area but only one in which a potential flood hazard exists. The boundaries of the flood plain extend to all areas potentially affected by a flood, which would occur statistically but once every 100 years. The record shows that within the flood plain, which is larger than the set-aside zone, "there are extensive commercial developments" and "a variety of industrial and commercial activities ranging in size from relatively small to up to 200,000 square feet of gross floor area." Cl. test., Jan. 29, 1982, at 40-41. The flood plain even includes the Longacres Racetrack. *Id.* These facts refute any notion that this area of the City may not be fully compatible with commercial use.

ventures are operating there, and (3) the area is easily accessible and is criss-crossed by major traffic arteries.[4]

Playtime is correct in one respect: the introduction to Renton's "Questions Presented" (Juris. State. at i) implied that the entire 520 acres were set aside for adult theatres *before* any adult theatre came to Renton. As the body of the Jurisdictional Statement made clear, prior to the entry of any adult theatre, the set-aside zone was about 400 acres in size—an area, incidentally, which would have accommodated some 335 adult theatres and surrounding parking spaces.[5] After Playtime entered Renton, the restriction on adult theatres' proximity to schools was reduced from one mile to 1,000 feet. The effect was to increase the set-aside zone from 400 to 520 acres. The important point, therefore, is that Renton acted in good faith prior to the attempted entry of any adult theatre, and that at all times the set-aside zone has been more than ample to accommodate all of the adult theatres that could possibly wish to locate within the City.

Playtime argues (pp. 3-4) that the Renton City Council studied only court rulings and not the experiences themselves in other cities. Playtime's argument is both irrelevant and wrong on the facts. Whether the City Council studied legal decisions or the facts underlying those decisions is surely without constitutional significance in determining whether the Council properly carried out its legislative function of determining the proper solution to the problems threatening its citizens and

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[4] *See* Juris. State. at 8-9.

[5] This figure is reached by using the same calculations which are set forth in our Jurisdictional Statement (p. 18 n. 38) and which Playtime does *not* dispute. Even under Playtime's mischaracterization of the facts, the smallest amount of land available in this case would constitute a larger percentage of the total land in Renton than was available for adult theatres in Seattle.

neighborhoods.[6] But the fact is that much more was studied than legal decisions.[7]

Playtime also argues (p. 3) that there was no "long period of careful preenactment study" by the City Council, and "[n]o written or legislative history exists" of its meetings.[8] Surely almost a year of study, meetings, testimony, documents and the like is enough,[9] and there was ample evidence as to what occurred at its meetings.[10]

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[6] The judicial decisions studied by Renton *recited* the experience in each of the cities to which the decisions related. *E.g., Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 52-57, 71, 74-75, 81-82 (1976); *Northend Cinema, Inc.* v. *City of Seattle*, 90 Wash.2d 709, 585 P.2d 1153, 1154-55 (1978), *cert. denied*, 441 U.S. 946 (1979). As noted *infra*, what Playtime apparently seeks is to have each city which is in the process of enacting a zoning ordinance go back and review all of the evidence underlying the experiences upon which the city is relying, even though the legal decisions set forth what those experiences were, and then apply that evidence to *existing* problems with adult uses in the city proposing the legislation.

[7] For example, Playtime states (p. 3) that as to Seattle, Renton reviewed only the Washington Supreme Court's ruling in *Northend Cinema* and a report which discussed "legal cases * * * relative to the propriety of regulating adult business." What Playtime fails to note is that this same report, written by the Assistant Corporation Counsel of Seattle, included "a summary of the Seattle experience." Cl. dep., March 4, 1984, at 11-12.

Moreover, in addition to the many documents reviewed (see Juris. State. at 5), Renton received advice from its own Acting Planning Director, who had had experience with adult uses in another State. *See* Juris. State. at 6 n. 11.

[8] Renton's counsel did indeed state, as Playtime notes (pp. 14-15), at oral argument to the Ninth Circuit that Renton's second ordinance was passed at least in part to set forth the legislative history which underlay the enactment of the first ordinance. But this was not for the purpose of "[f]abricating governmental reasons as a post-hoc justification for prior legislation", as Playtime charges (*id.*). The legislative history in the second ordinance was merely a memorialization of what had already occurred.

[9] *See* Juris. State. at 5-6.

[10] The District Court based its findings on substantial evidence as to what had occurred at the various City Council and committee hearings. *See* footnote citations in Juris. State. at 5-6.

2. *Experiences of Other Cities.*

Playtime seems to argue (pp. 5-8) that Renton did not really consider the experiences of other cities, and in any event it did not study enough of the facts underlying those experiences. We have already answered these points; the record is replete with evidence that Renton, over a period of almost a year, studied the experience of many cities, inside and outside the State of Washington. We respectfully submit that it is not the function of a court to pass judgment on whether a City Council heard "only unsubstantiated assertions and conclusions", as Playtime asserts (p. 7), or whether it considered solid evidence. The fact is that the City Council heard more than enough to reach the conclusion that it had better deal in a responsible manner with the potential threat of deterioration in its neighborhoods.

Playtime's treatment of *Genusa* v. *City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), is puzzling. Playtime first argues (p. 6) that the decision below and *Genusa* are not in conflict, and then states (*id.*) that the Ninth Circuit "declined to follow the rule of *Genusa*". The reason for the failure to follow the *Genusa* rule, according to Playtime (pp. 6-7), is that Renton's ordinance must have been unrelated to the effects of "concentration", since "clustering" is not prohibited. But Renton was not just concerned with the effects of one or more adult theatres; it was concerned with *where* those effects would take place. It wanted the effects to manifest themselves away from schools, churches, residences and public parks, but in other accessible areas. As this Court and the Washington Supreme Court have pointed out, the choice of methods for dealing with the adult theatre problem—whether by concentration or dispersal—is constitutionally irrelevant.[11]

Genusa's importance lies not in whether it was a concentration or dispersal case, but rather in the fact that

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[11] *Young*, 427 U.S. at 62-63; *Northend Cinema*, 585 P.2d at 1159.

the Seventh Circuit held to the common-sense view, adopted by the District Court below (App. 30a) but rejected by the Ninth Circuit (App. 17a, 19a), that "[a] legislative body is entitled to rely on the experience and findings of other legislative bodies as a basis for action." 619 F.2d at 1211.[12]

Playtime virtually concedes that under its theory a city cannot enact an adult-use zoning ordinance in advance of the entry of adult theatres. Thus, it argues (p. 16) that adult-use ordinances are valid only if "the cities are able to adequately *identify* and *document* a secondary affect upon their community of a particular land use which creates a substantial governmental interest in dealing with that problem * * *" (emphasis added). It would be impossible to meet this test until and unless adult theatres had gained entry and caused the secondary affects.

Finally, it is important to note that the Ninth Circuit's ruling in regard to the impermissibility of reliance by cities on the experience of others is already being expanded to areas far removed from adult uses. Thus, in *Preferred Communications, Inc.* v. *City of Los Angeles*, No. 84-5541 (9th Cir. Mar. 1, 1985), the Ninth Circuit held that a city may not, under the First Amendment, prohibit a cable television operator from having access to public utility facilities. The court cited the instant case, in part, for the proposition that a city must justify its regulations in terms of its own problems and "may not rely on the problems faced by other communities * * *." *Id.*, slip op. at 16-17, 24, incl. n.9. Thus,

[12] The Ninth Circuit's statement (App. 19a) that "[w]e do not say that Renton cannot use the experiences of other cities as part of the relevant evidence upon which to base its actions" goes for nothing, because that court would require an experience and an ordinance exactly like those of Renton. There would never be such a duplication. Even more to the point, how could Renton duplicate an experience it had not yet had?

there is an urgent need for this Court to clarify the extent to which a city must replicate the experience of others before it can enact legislation.

3. *The "Availability" of the Land.*

Playtime argues (p. 10) that the Court of Appeals did not require property in the set-aside zone to be "immediately available for purchase". The fact is that the Court of Appeals held the set-aside zone to be improper in part because it was *already* occupied by a business park, warehouse and manufacturing facilities, and "a fully-developed shopping center". App. 13a-14a. The only way such a conclusion could have relevance would be if existing uses made the property constitutionally "unavailable".[13]

Playtime wants to have it both ways: if the property is presently undeveloped, Playtime claims the property is constitutionally "unavailable"; if the property is presently developed, Playtime claims the property is likewise constitutionally "unavailable". The only option in its view is that the City undertake the burden of providing an immediately occupiable building to suit its needs—something the Constitution does not require.

Playtime also uses (pp. 10-11) such words as "unattractive", "undesireable", "economically unviable", "remote" and "isolated" to describe the set-aside zone. Aside from the fact that these descriptions are not supported by the record,[14] Playtime nowhere explains why such facilities as "a fully-developed shopping center" would already have located in such an area.

Make no mistake: what Playtime and other adult theatre owners are seeking, as a matter of constitutional

[13] Of course, even if that were the proper rule—which it clearly is not—it would ignore the fact that much of the land in the set-aside zone is unoccupied. *See* Juris. State. at 18-19, incl. n. 41.

[14] The District Court's findings wholly refute them. App. 27a-28a.

right, is to gain preferential access to the best sites, located in downtown, congested areas, without regard to the degrading effect upon the character of the surrounding neighborhood. This was made clear by one of Playtime's witnesses, who stated that "in the exhibition business you must rely on movie posters, you must rely on marquees or walk-by and drive-in traffic in addition to your advertising. That's a very important part of advertising. And out there [in the Renton set-aside zone] you just don't have it." [15] In other words, these adult theatre owners are seeking not just land located near urban and commercial areas, and easy access through boulevards and streets, but locations in the middle of the most congested areas so they can entice customers off the streets with their advertsing. They are seeking not just availability, to which they are constitutionally entitled, but guaranteed business, to which they are not.

As the District Court found (App. 26a-28a), Renton's set-aside zone is large, accessible, and in all stages of development. If this zone will not stand constitutional muster, *Young* is a dead letter, and communities are powerless to experiment in this important area of land use planning.[16]

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[15] John. test., June 23, 1982, at 30. This same approach was confirmed by another of Playtime's witnesses, who said that "[a] theatre must be located in a people-oriented environment that has regular nighttime traffic and complimentary businesses such as fast-food outlets and restaurants." A theatre, he said, must be "generally a focal point of nighttime recreation activity." Bond aff., June 15, 1982, at 4.

However, the fact that an adult theatre does not have to be centrally located in order to attract customers was demonstrated conclusively by Playtime's own President, who testified that patrons drive from 20 to 30 minutes from Vancouver, B.C., to Playtime's theatre in Point Roberts, Washington (population 250), to view adult films. Forbes dep., May 27, 1982, at 27.

[16] Twice in this section of its Motion to Affirm, Playtime describes its film fare as "nonobscene" (p. 12). While it is hardly determinative of the issues in this case, we call the Court's attention

4. *Legislative Intent.*

Playtime's discussion of a court's role in regard to legislative fact-finding demonstrates why a review of the instant case by this Court is imperative. Playtime begins its discussion by stating (p. 12) that in making a determination of legislative motive, only the objective legislative history may be employed. However, Playtime then says (p. 13) that where "mixed motives" are apparent, a court must determine whether "a" motivating factor was to restrict the exercise of First Amendment rights. This test, it says (pp. 13, 14), "necessarily involves a determination of the motives of the legislative body" and "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available". Without arguing again what the proper rule should be,[17] we merely point out that the tests proposed by Playtime clearly do not follow from this Court's opinions and appear to be wholly unworkable. A court should not be second-guessing a city council in the performance of its legislative functions, trying to determine "mixed motives" and engaging in a "sensitive inquiry" into the issue of intent. This Court has repeatedly pointed out that "inquiry into legislative motive is often an unsatisfactory venture" [18] and has repeatedly declined to engage in such a venture even when the legislative motive was suspect.[19]

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to the fact that a state court has held some of Playtime's films in Renton to be obscene. *City of Renton* v. *Playtime Theatres, Inc.*, No. 82-2-02344-2, slip op. at 23-29, 39 (King County, Wash. Sup. Ct., Mar. 9, 1984).

[17] *See* Juris. State. at 21-24.

[18] *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983).

[19] *E.g., Pacific Gas & Elec. Co.*, 461 U.S. at 215-216; *Michael M.* v. *Superior Court*, 450 U.S. 464, 469-470 (1981) (plurality opinion); *United States* v. *O'Brien*, 391 U.S. 367, 383-384 (1968); *Palmer* v. *Thompson*, 403 U.S. 217, 224 (1971).

In any event, the point here is that if what Playtime argues and the Ninth Circuit has adopted is to be the test, this Court should say so, because such a ruling will affect local legislatures and lower courts for the indefinite future.

CONCLUSION

As evidenced by the strong *amicus* support from mayors, cities, counties and state governments from across the country, the issues in this case are of extraordinary importance. Local governments have attempted in various ways with various ordinances to deal with the deterioration of neighborhoods as a result of adult uses. These efforts have been almost universally frustrated by the lower courts, despite this Court's decision in *Young*. If the good-faith attempt by Renton will not stand, cities are helpless to experiment in this area of growing local and regional concern. This Court should note probable jurisdiction and reverse the decision below.

Respectfully submitted,

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